

Catherine R. Gellis, Digital Age Defense, June 29, 2015

The following responds to the second supplemental question issued for Class 22:

*Please briefly address how the proposed exemption might relate to or be limited by other federal or state laws or regulations, including but not limited to the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030, and any other statutory or regulatory provisions.*

As with the prior comment submitted and in-person testimony given at the hearings in Los Angeles, this response is equally applicable to Classes 11-27, which all involve bypassing technical protective measures preventing access to computing logic.

### **Introduction**

Opponents to this proposed class (as well as the other automotive class 21) have listed a variety of harmful events that could arise if this exemption is granted. To the extent that any of these or other potential harms are plausible, two things remain true: (A) none of these harms are harms that sound in copyright, and (B) to the extent law is necessary to deter or remediate these harms, that copyright law is not the law to do it.

On the contrary, the role for copyright law at this juncture is to get out of the way so that more effective laws more specifically tailored to the type of conduct proposed by these exemptions can more appropriately govern their consequences. If copyright law is to play any role here at all it should be to do what it, at its core, is uniquely designed to do: promote innovation.<sup>1</sup> But innovation is not promoted by saying no to innovative activities, or activities that, as in the case of this particular class, are all about discovery and knowledge-sharing. These are exactly the types of activities the progress of arts and sciences depends on. It is therefore copyright law's job to say yes to them to help ensure that they are not chilled by threat of sanction.

### **Other law is better suited to addressing the types of consequences opponents fear.**

In comments and in testimony it was suggested that other laws, including the Computer Fraud and Abuse Act (CFAA), were already better situated to deal with the types of non-copyright related harms opponents to this and other similar classes worried might result if these exemptions were granted. For instance, in testimony it was pointed out that the CFAA was initially designed to confront the possibility that nefarious computer users might impermissibly undermine the security of the nation's nuclear arsenal.<sup>2</sup> It is not difficult to believe that a law designed to address that type of negative outcome could also reach other negative outcomes if computing technology is used in destructive ways.

But whether the CFAA, or any other existing law, does or does not currently address these sorts of speculated harms should be irrelevant to this rulemaking. The operable point is that other law could.

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<sup>1</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>2</sup> See, e.g., Declan McCullough, "From 'WarGames' to Aaron Swartz: How U.S. anti-hacking law went astray," CNET, March 13, 2013, available at <http://www.cnet.com/news/from-wargames-to-aaron-swartz-how-u-s-anti-hacking-law-went-astray/>.

Congress (and, where applicable, other local authorities) are fully capable of designing law to deter computer uses deemed socially detrimental, just as they are capable of designing law to deter any other use of any other tools deemed socially detrimental. Particularly in the case of automobiles, we have years of evidence demonstrating how this sort of regulation would work. For example, people have long been able to modify the physical attributes of their cars, such as by tinting their windows, without needing to seek the permission of the copyright office before they did so. But just because it did not violate copyright law to tint one's windows has not meant that it was safe, or legal, to do so. Some states<sup>3</sup> have opted to regulate window tinting and made it an offense to drive cars where this modification has been made. In other words, even though copyright law did not speak to this sort of modification, that silence did not declare it open season for people to do whatever they wished to their property irrespective of its effects.<sup>4</sup>

In fact, not only is other law capable of addressing negative consequences that may result from when people explore the full contours of their technology's functionality, but other law is more likely to do so, and more effectively, if copyright law does not try to insert itself into these regulatory questions. Not only is copyright law ill-suited to adequately weigh the pros and cons or effective nuances of technology regulation through these triennial proceedings, but if it were to attempt to, it would suppress attempts by more appropriate regulators, federal and state, to better tailor regulation around the harms, and benefits, of these technology uses. In other words, by getting § 1201's prohibitions out of the way, we create the space for these authorities to create the appropriate regulation needed to address the sorts of consequences arising from technology uses that opponents to these classes fear.

**Copyright law is better suited than most other law to encourage the types of positive outcomes society benefits from as a result of the sort of conduct proposed in these class exemptions.**

As explained in testimony, Classes 11 through 27 all involve interacting with computer logic. As such, many of these classes involve people interacting with what, for all intents and purposes, are simply computers, just like computers were understood by Congress when it passed the DMCA in 1998 (albeit in a different physical form than the home PC took back then). But the concern prompting the DMCA was not that people might use their computers in ways that were harmful but simply that copyrighted content might be consumed or copied in a way that was unlicensed. We see evidence of this narrow purview in the statute's bare language proscribing circumvention of a technical protective measure controlling access to a "*work protected under this title*."<sup>5</sup> The DMCA was not written as a law governing basic use of a computer, which is not a work protected by copyright, and it should not become one just

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<sup>3</sup> See, e.g., California Vehicle Code §§ 26708, 26708.5. See also "Window Tint Laws: State-Specific Information," Find Law, available at <http://traffic.findlaw.com/traffic-tickets/window-tint-laws-state-specific-information.html>; <http://tintlaws.com/> (compiling window tint laws for all states).

<sup>4</sup> At the hearing for Class 22 opponents emphasized pollution being a possible undesirable byproduct of automotive software modifications. But even in that instance the record reflects that federal and local governments maintain regulation governing emissions, including emissions from car engines users may have physically modified. There is no evidence that this regulation has been dependent on copyright law to set or enforce these standards.

<sup>5</sup> 17 U.S.C. § 1201(a).

because the computers at issue in these classes have technical protective measures interfering with how people might choose to use the processing power of a particular computing device.

It especially should not become such a law because we have other law, such as the CFAA (as well as various state law analogs<sup>6</sup>), to govern computer use and penalize certain types of uses deemed impermissible or harmful. The problem with these laws, however, is one that was raised in my initial comment. It is a problem we see most prominently with the CFAA, which is that the CFAA, for all its power, is a very blunt weapon that can very easily punish computer uses that are beneficial as well as those that are not:

*[T]he CFAA has been a powerful weapon against people who have used computing devices in ways that some have thought they shouldn't, regardless of whether those uses were consistent with promoting the progress of the arts and sciences, or even whether the people targeted [by this law] otherwise had the right to use the computing device as they [so] chose. While assessing the correctness of these CFAA interpretations is beyond the remit of this Office, the Office works in a universe where the threat to punish the use of computing technology not explicitly permitted is a very real one, and one that stands to chill the sorts of activities the Office is charged with protecting under § 1201(a)(1)(C)(iii). Without these exemptions there is significant legal uncertainty for people who want to research, or even just modify in the course of ordinary use, the types of computing devices described in proposed classes 11-27, if the ways they seek to interact with these devices are ways the technical measures built into them do not allow.*

As argued in that comment, if the Copyright Office is to protect these activities, as it is charged with doing under § 1201, it must issue the petitioned-for exemptions in order to ameliorate the uncertainty over whether the conduct in the contexts described by the petitioned-for classes is lawful.

It is important to note, however, that in removing the doubt over whether a circumventing activity is “lawful” the Copyright Office cannot “bless” a computer use that Congress (or other applicable regulatory body) has otherwise determined is unlawful. It simply speaks to the conduct and context proposed by the petition and says that this conduct in this context cannot be found unlawful based solely on the circumvention of technical protective measures preventing these sorts of non-copyright-infringing computer uses.

It may well be that issuing these exemptions will have no effect whatsoever on any other applicable regulation, particularly if other regulation targets these sorts of computer uses in a specific enough way that the role of copyright law is superfluous. However, to the extent that other laws, such as the CFAA, assess the question of wrongfulness based on the permissibility of an action, it is important the Copyright Office remove § 1201's prohibitions as a potential basis for concluding the computer-using conduct described in these classes is impermissible.<sup>7</sup>

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<sup>6</sup> See, e.g., Cal. Pen. Code § 502.

<sup>7</sup> The full scope and meaning of the CFAA's admonitions that acts taken “without authorization” or “exceeding authorized access” is still being tested in the courts. Jonathan Mayer, “Computer Crime in the Courts: a Legal Synthesis and Empirical Assessment (draft),” March 2015, at 20 (on file with author) (“Efforts at scoping CFAA's

This action is important because the CFAA does not contain within it any mechanism for determining whether the underlying computer use is one that advances the interests underpinning copyright—namely, the promotion of the progress of arts and sciences—as copyright law does. Even the internal logic of § 1201 addresses the situation where barriers constructed to prevent access to works can be lowered via these rulemakings when they adversely affect non-infringing uses of copyrighted works.

But there is no similar escape valve, or fair use defense,<sup>8</sup> available under the CFAA, and what is worse is that it may be copyright law itself that ends up being the sole impetus priming the CFAA for attack. In other words, we are facing a situation where barriers erected under the auspices of copyright<sup>9</sup> threaten to become the basis by which the CFAA gets its teeth to sanction the very sort of inherently non-infringing activity that copyright law was never intended to prevent.

In fact, it is quite the contrary: the conduct at issue in this class, as well as other similar classes, is exactly the sort of knowledge-enhancing conduct copyright law is intended to foster. As a result, the Copyright Office should grant these exemptions in order to ensure that copyright law does not become the basis by which the very thing it is supposed to promote is not inadvertently suppressed by these other laws.

## Conclusion

Others have ably argued how the activity described by Petition Class 22, as well as the other classes 11-27, are non-infringing and ultimately benefitting to the public interest by allowing people to fully assess the functionality of and, indeed, vulnerabilities in the computing devices they legitimately possess. Not only does such an exemption advance their own freedom-to-tinker, a tradition of innovation and discovery long permitted,<sup>10</sup> but the resulting knowledge itself can help stave off many of the harms that opponents fret about.<sup>11</sup> For these positive results to be realized, however, and negative ones to be avoided,<sup>12</sup> copyright must stay true to its foundational purpose of promoting innovation by liberally grant the petitioned exemptions and not attempting to supplant more nuanced regulation better tailored to addressing non-copyright related effects of people’s computer use.

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‘authorization’ provisions have resulted in at least seven competing standards.”). It may well be that under at least some of these standards the concern raised here is a non-issue. Because this area of case law is still evolving, however, it cannot currently be said with certainty that there would be no deleterious effect on legitimate computing uses resulting from interplay between § 1201 and the CFAA, as described in the paragraphs that follow.

<sup>8</sup> See Mayer, *supra* note 7, at 10.

<sup>9</sup> Maureen O’Rourke, “Common Law and Statutory Restrictions on Access: Contract, Trespass, and the Computer Fraud and Abuse Act,” 2 J.L. Tech & Pol’y 295 (“Until enactment of the Digital Millennium Copyright Act ... copyright law had little to say about access.”).

<sup>10</sup> See, e.g., Pamela Samuelson, “Freedom to Tinker,” *Theoretical Inquiries in Law* (forthcoming), at 2, available at <http://ssrn.com/abstract=2605195>.

<sup>11</sup> See *id.* (citing Edward Felten, “The New Freedom to Tinker Movement,” *Freedom to Tinker*, Mar. 21, 2013, <https://freedom-to-tinker.com/blog/felten/the-new-freedom-to-tinker-movement/>).

<sup>12</sup> See Samuelson, *supra* note 10, at 3 (citing Andrew W. Torrance & Eric von Hippel, *Protecting the Right to Innovate: Our “Innovation Wetlands,”* MIT Sloan Working Paper 5115-13, at 3-4, available at <http://ssrn.com/abstract=2339132> (“Legislative bodies and governmental agencies whose legal actions raise consumer innovation costs can greatly damage this economically important and individually-valued activity. In fact, for many individuals, the mere worry that their innovative activities might trigger governmental agency scrutiny or penalties is sufficient to chill, or even end, those activities.”)).